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In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement was filed with the Petition for Writ of Certiorari, and remains current.

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ARGUMENT

By its silence, the Chicago Park District has apparently conceded one point made by Petitioners: that core political speech receives the most protection the First Amendment provides, and certainly as much protection as sexually explicit speech. The Park District argues, however, that unless a permit ordinance actually authorizes censorship, or contains unlawful discretion, the procedural safeguards in *Freedman v. Maryland*, 380 U.S. 51 (1965) are not necessary. Accordingly, claims the Park District, it is an unsuccessful permit applicant who must seek judicial review, and bear the burden of proof. The Park District also urges the Court to hold that prompt access to the courts satisfies *Freedman*, and that content-neutral permit ordinances are not prior restraints, but time, place and manner regulations. Those ordinances are presumed valid and the applicant must prove otherwise.

Were this Court to accept those arguments, persons espousing unpopular positions – especially positions contrary to politically sensitive government policies – would find it increasingly difficult to obtain use of the public fora.[1] Many speakers, denied permits to express unpopular ideas, would likely forego their rights rather than engage in protracted litigation. And since much political speech expressed at public rallies

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[1] Many examples of government efforts to suppress political speech are found in this Court's opinions. Without First Amendment protection, would Reverend Shuttlesworth been able to march through the streets of Birmingham? *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Without the First Amendment could Gregory Johnson burn his flag in Dallas? *Texas v. Johnson*, 491 U.S. 397 (1989). Could the American Nazi Party march through Skokie? *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). Each sought to engage in political speech strongly opposed by the government imposing a permit requirement, and by a large majority of the public as well.

is extremely topical, the simple act of denying a permit might well silence the speaker forever. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

I. THE PARK DISTRICT APPARENTLY AGREES THAT CORE POLITICAL SPEECH RECEIVES THE MAXIMUM AFFORDED BY THE FIRST AMENDMENT.

In the Park District's Brief, no response is made to Petitioners' argument that core political speech receives the maximum protection of the First Amendment.[2] The closest the Park District comes to supporting the Seventh Circuit's position that sexually explicit speech needs more protection than political speech is when it said:

> Petitioners attempt to distinguish *FW/PBS* on two grounds. First, petitioners say, *FW/PBS* involved sexually explicit speech that is, *according to petitioners*, of lower value than the political speech in which they engage. See Pet. Br. 36. But nothing in the reasoning of the majority in *FW/PBS* suggests that that decision rested on an assessment of the value of the speech involved. The Court assumed that the speech at stake was fully protected. See 493 U.S. at 224 (plurality opinion); *id.* at 245 (opinion of White, J.).[9]
>
> Respondent's Brief at 18 (emphasis added).

[2] The Park District is not alone in failing to defend the Seventh Circuit's position. Not a single *amicus* brief supports the panel's position. And Petitioners are aware of no case from any federal circuit court or district court that lends any support to what has to be viewed as the somewhat bizarre position of the Seventh Circuit panel.

In fn. 9, the Park District wrote:

> Justice Scalia's opinion came closest to viewing the speech in question as lower value; he reasoned that businesses engaged predominantly in the sale of sexually-oriented material could be held to be engaged in the constitutionally unprotected activity of pandering, under *Ginzburg v. United States*, 383 U.S. 463 (1966). See 493 U.S. at 256-58 (Scalia, J., concurring in part and dissenting in part). No other Justice joined his opinion, however.

Those few statements are hardly a ringing endorsement of the panel opinion on this point. With its silence the Park District apparently has joined the Petitioners and every *amici* in taking the position that core political speech is entitled to maximum protection under the First Amendment, and certainly deserves at least as much protection as the sexually explicit speech with which the Seventh Circuit panel was concerned.

II. PRIOR RESTRAINT ANALYSIS IS THE ONLY WAY TO PROTECT CORE POLITICAL SPEECH FROM UNCONSTITUTIONAL PERMIT RESTRICTIONS.

The Park District urges the Court to hold that unless a permit ordinance expressly authorizes the

government to base a permitting decision on the content of the proposed speech, or the ordinance contains unlawful discretion, the ordinance is not a prior restraint, but a time, place and manner regulation. Respondent's Brief, at 13, n. 7.

First, this Court has never taken the position urged upon it by the Park District.[3] The Park District extrapolates its position from several opinions of the Court, pointing to no opinion directly holding what the Seventh Circuit said. To the contrary, one of the cases cited by the Park District should be read as a rejection of the Park District's approach.

In *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1990) the Fifth Circuit held that a Dallas licensing ordinance aimed at sexually oriented businesses was a time, place and manner regulation, rejecting the claim of the businesses that it was a prior restraint on speech. This Court disagreed. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The plurality opinion includes the following language (at 223):

> . . . Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at

[3] The closest the Court has come to such a limitation has been in cases presenting the monumental constitutional clash between a woman's right to privacy in abortion cases and the right of those opposed to abortion to protest the exercise of that right. See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000). But those cases do not involve censorship concerns, only a balancing of two important constitutional rights. In this case, the balance is between the right to engage in core political speech in a public forum and the right to play volleyball or have a picnic in a tranquil setting.

> secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975).[4]

The Dallas ordinance was certainly content-neutral. Neither the Park District nor the Seventh Circuit disagree. The Park District concludes that because the Dallas ordinance contained unlawful discretion, it was a prior restraint, despite the fact that it did not expressly authorize censorship. But that is not what the opinion said. According to the opinion, the Court utilized a prior restraint analysis because the ordinance did not include *Freedman*'s procedural safeguards. From that statement, one must draw the conclusion that *any* permit ordinance restricting First Amendment rights must first comply with *Freedman*: it must be limited to a specified, brief period of time; it must provide prompt judicial review; and it must place the burdens of initiation and proof on the government. Only then does a reviewing court determine if it *also* meets the less rigorous test applied to time, place and manner restrictions.[5]

The Park District's approach to this case, and this permitting scheme, fails for a second reason. The Park

[4] Six Justices – three in the plurality and three in concurrence – used a prior restraint analysis.

[5] There is no other way to read the plurality opinion, which said the Court did not reach the time, place and manner issue because the ordinance did not satisfy *Freedman*. One must assume, then, that if the ordinance included *Freedman*'s procedural safeguards, the Court would next have determined if the ordinance was content-neutral, if it served a substantial governmental interest, and if it allowed reasonable alternative avenues for the expression. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Obviously, a permit ordinance must satisfy both tests.

District readily admits that if an ordinance contains unlawful discretion, it is a prior restraint.[6] Well, this ordinance contains quite a bit of discretion, and it is generally unfettered.

The best place to look for a review of the discretion in the ordinance is Magistrate Judge Keys' Report and Recommendation, rejected by the District Court. App. to Pet. at 14a. Judge Keys meticulously focused on the language of the ordinance – as a reviewing court is required to do in prior restraint cases, given the presumption that the ordinance is unconstitutional. He found many ways the City could deny a permit for improper reasons. App. to Petition, at 32a - 42a. In addition to the many possibilities for discretion in the numerous bases for denial in the ordinance, its language contains the following:

> To the extent permitted by law, the Park District *may* deny an application for permit if the applicant or the person on whose behalf the application was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of an applicant. The Park District *may* also deny an application for permit on any of the following grounds . . . .

[6] This seems to be completely backwards. This Court's opinions tell us that if a permit is required to engage in First Amendment rights, *that* makes it a prior restraint. Then, if the restriction contains unlawful discretion, it is an *unlawful* prior restraint. The inclusion of discretion does not make it a prior restraint; it makes it unconstitutional.

> App. to Respondent's Brief, at 1a (emphasis added).

The Park District *may* deny a permit. It is not required to do so. It can obviously pick and choose who gets a permit after violating permit conditions in a previous rally, and who does not. And the Park District cannot point to any language in the ordinance limiting the discretion of the Park District in making this decision.[7] A rejected permit applicant must then challenge the denial in a lengthy and difficult appeal from the decision of an administrative agency, facing the monumental task of proving that the denial was because of the content of his proposed speech.[8] This Court said that is too much of a burden on the right to free speech:

> . . . [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case

[7] The discretion is more onerous when one realizes that the Park District can hold the permittee responsible for rules violations regardless of who committed them.

[8] Given the presumption of correctness given a decision of an administrative agency, and the lack of a record under this ordinance, that task would be almost impossible to accomplish.

> whether the licensor is permitting favorable, and suppressing unfavorable, expression.
>
> *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758 (1988)

If this Court finds that Judge Keys was right, and that the amount of discretion in the ordinance is excessive, the Park District must then acknowledge that *FW/PBS* applies here, and that the ordinance is a prior restraint.

III. EACH OF *FREEDMAN*'S PROCEDURAL SAFEGUARDS MUST ACCOMPANY A PRIOR RESTRAINT ON POLITICAL SPEECH.

If this ordinance is a prior restraint, there is no reason for limiting the applicability of *Freedman v. Maryland*. The approach of the Seventh Circuit is simply untenable. That Court would apply *Freedman* only to prior restraints that authorize censorship or that restrict sexually oriented businesses. That Court would elevate sexually explicit speech to a preferred position under the First Amendment because of the possibility that "state courts might drag their heels in deciding appeals by sexually oriented businesses from denials of licenses." App. to Petition, at 12a.

To the contrary, if *Freedman* applies to sexually explicit speech – as all agree it does – then core political speech in a traditional public forum deserves no less. After all, this is the very speech that we have historically "march[ed] our sons and daughters off to war to preserve." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)(plurality opinion).

Therefore, the Chicago Park District ordinance must fail constitutional review because it lacks procedural safeguards (and, of course, because of its unfettered discretion). Those safeguards include the requirement for prompt judicial review.

IV. PROMPT JUDICIAL REVIEW MUST INCLUDE THE REQUIREMENT OF A PROMPT JUDICIAL DECISION.

As Petitioners pointed out in their Petition, the Seventh Circuit began this journey in *Graff v. City of Chicago*, 9 F.3rd 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1984), when it decided that the plurality opinion in *FW/PBS* somehow modified the meaning of the phrase "prompt judicial review." Focusing in on a few trees rather than viewing the forest, the *Graff* plurality said that the *FW/PBS* opinion only required immediate access to a reviewing court when a permit is denied. The opinion below rests its holding on that determination of the plurality in *Graff*.[9]

This Court spoke very clearly in *Freedman*. It said that prompt judicial review must include a speedy judicial determination. And this Court did nothing in *FW/PBS* to weaken that requirement. The plurality opinion in *FW/PBS* said that prompt judicial review must be available. The Seventh Circuit and the Park District would say that mere access to the courts following a denial of a permit satisfies *Freedman*. But that is not what *Freedman* said, and that is certainly not what *FW/PBS* said. The *FW/PBS* plurality opinion said that under *Freedman*, "expeditious judicial review of that decision must be available." 493 U.S. 215, 227. *Expeditious* judicial review must be available, not simply

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[9] As noted in the Petition, each of the judges in this case were in the plurality in *Graff*.

judicial review. As the Ninth Circuit said in *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998), prompt access to a court, with no requirement of a speedy judicial decision, makes this procedural safeguard meaningless.

Of course, there is a sound judicial reason for rejecting the approach of the Seventh Circuit and the Park District. *This* Court can, of course, abandon *Freedman*, although there would seem to be no good reason for doing so. But if the concept of *stare decisis* is to have any vitality, an opinion of this Court cannot be overlooked or disregarded by a *lower* court unless this Court clearly says so. When a lower court can ignore an opinion of this Court by professing confusion about this Court's opinion – as the Seventh Circuit did in *Graff*, this Court's opinions cease to be the law of the land and, instead, become non-binding guides for lower courts. *FW/PBS* did not abandon or overrule *Freedman*'s requirement for a prompt judicial *decision*, and unless it does so, the Seventh Circuit is bound by that decision.

V. IMPRACTICALITY IS AN INSUFFICIENT REASON FOR ABANDONING THE FIRST AMENDMENT.

Finally, the Park District claims that it is simply impractical to require it to comply with the First Amendment as construed in *Freedman*. Respondent's Brief at 20-21. The Park District does not indicate why it would be more impractical for it to seek judicial review of its decision to deny a permit than it was for the State of Maryland to do the same, as *Freedman* required. One assumes that the Maryland censorship board reviewed quite a few films each year. It must have been very impractical for the State to seek judicial review each time it turned a permit down.

But the Park District's complaint of impracticality falls under its own evidence. The Park District has filed "Lodging Material" with its Brief. That document is a list of permit applications in the first eight months of 2001. That list includes more than 1,000 permit applications. It might well be impractical, and probably impossible, for the Park District to seek judicial review for each permit denied.

But the list is for permits *granted!*. There is no list of permits *denied*. It is reasonable to believe that there were not thousands of *them*. The Park District would only have to seek review if a permit application was denied, not if it was granted. This makes the impracticality argument a lot less persuasive.

But a second fact, deduced from the Lodging Material, eliminates the argument completely. The Lodging Material has 70 pages of permits. In that lengthy list, Petitioners can find *fourteen* permits with political speech considerations. The vast majority of permits were for picnics and sporting events. *Freedman* does not apply to picnics. The Park District granted those fourteen permits, including three for these Petitioners.[10] It would seem, then, that in the first eight months the Park District would not have had to file a single suit. Even if it had denied every political speech permit applied for, it would have had to seek judicial review fourteen times, less than two times a month. That isn't very impractical.

If a permit is denied because the park has already been reserved for someone else under a permit, or if the park simply will not accommodate the number of persons expected at the rally, judicial review is probably unnecessary. One can subjectively analyze each

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[10] The Park District has certainly developed a different attitude toward Petitioners' applications since this litigation began.

decision. But except for these limited situations, whenever a permitting authority denies a permit for core political speech in a public forum, it must meet its constitutional responsibility to protect political speech at all costs. Initiating judicial review does not seem too much of a burden in those cases.

CONCLUSION

The very life of core political speech is in danger. A government must never be allowed to decide who gets to speak in a public forum and who doesn't. The possibility that such speech can be suppressed is grounds for judicial intervention, for as this Court said:

> Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license.
>
> *FW/PBS*, 493 U.S. 215, 227.

The opinion of the Seventh Circuit must be rejected.

Respectfully submitted,

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